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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ERNESTO JONATHAN GONZALEZ, Defendant and Appellant.	2d Crim. No. B290281 (Super. Ct. No. 2017017417) (Ventura County)

Ernesto Jonathan Gonzalez appeals from the judgment after a jury convicted him of assault with a firearm (Pen. Code,[1] § 245, subd. (a)(2)), criminal threats (§ 422), discharging a firearm from a motor vehicle (§ 26100, subd. (d)), and possession of a firearm by a felon (§ 29800, subd. (a)(1)). The jury also found true an allegation that Gonzalez personally used a firearm while committing his crimes (§ 12022.5, subd. (a)). The

[1] All further unlabeled statutory references are to the Penal Code.

trial court found true allegations that Gonzalez suffered a prior serious felony conviction (§ 667, subd. (a)) and a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It sentenced him to 27 years in prison.

Gonzalez contends: (1) the trial court abused its discretion when it denied his motion for a new trial, and (2) his sentence is unconstitutional. We affirm.

FACTUAL AND PROCEDURAL HISTORY

Gonzalez and A.A. began dating in April 2017. During the course of their relationship, A.A. never saw Gonzalez hold a firearm. But she did see a photograph of him with a gun on his Instagram account.

In May, Gonzalez spent an evening drinking at A.A.'s home. Around 10:00 p.m., Gonzalez asked A.A. to take him to a bar. She refused. She said she was going to take him home instead.

During the ride to his house, Gonzalez yelled "Fuck you, bitch!" at A.A. and pulled out a gun.[2] He also yelled "I'm gonna kill you!" and "I fucking hate you!" He pointed the gun out the passenger window of the car and fired one shot at a building across the street. Gonzalez then pointed the gun at A.A. and threatened her again.

When the couple arrived at the alley behind his home, Gonzalez got out of the car and fired his gun at the ground. He then walked to the driver's side window, grabbed A.A.'s head, and put the barrel of the gun into her mouth. He said "I fucking hate you. I'm going to kill you. I know where you and your

[2] A.A. is not familiar with guns, but said the gun Gonzalez had in the car was smaller than the one she had seen on his Instagram account.

family live. Just know, if you got killed, it was me." The gun felt cold on A.A.'s gums. When Gonzalez took it out of her mouth, he said he would shoot her if she did not leave within five seconds.

A.A. drove to a nearby parking lot. She sent a text message to her mother, who told her to call the police. About an hour later, A.A. called 911. She told the operator that she was scared and that she wanted Gonzalez arrested.

Officers Victor Gonzalez and Kevin Fessler responded to A.A.'s call. Officer Fessler found a .22-caliber bullet casing on the front, passenger-side floorboard of A.A.'s car. There were scuff marks on the casing.

A.A. told Officer Gonzalez that Gonzalez threatened her with a gun. She feared for the safety of her family. She wanted Gonzalez arrested.

Police arrested Gonzalez the next day. Officers did not test his hands for gunshot residue.

A few days later, Sergeant Brandon Ordelheide went to the alley behind Gonzalez's house and found a .22-caliber spent shell casing. It appeared to have been stepped on or run over. There were no impact marks on the ground near the casing.

A forensic scientist determined that the casing found in A.A.'s car had been fired from the same weapon as the casing found in the alley behind Gonzalez's house. Fingerprint analyses of the bullets yielded no positive results. No firearm was ever recovered.

At trial, the prosecution presented evidence that Gonzalez previously committed domestic violence. (See Evid. Code, § 1109.) Gonzalez's ex-girlfriend testified that he hit her with a baseball bat. After his arrest, Gonzalez sent text messages claiming he had weapons and would kill her.

On March 1, 2018, the jury convicted Gonzalez of all charges. Four days later, Sergeant Ordelheide interviewed A.A. about two .38-caliber bullets she had brought to the police station in June or July 2017. He wrote a report of the interview and gave it to prosecutors, who in turn gave a copy to Gonzalez.

According to the report, A.A. found the two bullets under the spare tire in the trunk of her car. She assumed they belonged to Gonzalez because he had previously put items in the trunk. Sergeant Ordelheide did not write a report earlier because the bullets A.A. found were not the same caliber as those connected to Gonzalez's crimes.

Gonzalez moved for a new trial based on Sergeant Ordelheide's report. He argued that the newly discovered evidence undermined A.A.'s claim she had no access to guns and ammunition. He also argued the bullets would have helped to point out the inconsistencies in A.A.'s testimony and to undermine her credibility with the jury.

The trial court deemed the evidence of the bullets immaterial. The evidence was not relevant because the casings found in A.A.'s car and in the alley were a different caliber than the bullets found in the trunk. Though the court "wasn't all that convinced of all of [A.A.'s] testimony"—specifically that Gonzalez put a gun in her mouth—"the jury was." The court denied Gonzalez's motion.

The trial court sentenced Gonzalez to 27 years in state prison: the upper term of four years on the assault conviction, doubled to eight years because of his prior strike; a consecutive 16 months on each of his three additional convictions; a consecutive 10 years for the firearm enhancement; and a consecutive five years for his prior serious felony.

DISCUSSION

New trial motion

Gonzalez contends the trial court abused its discretion when it denied his motion for a new trial. We disagree.

A motion for a new trial based on newly discovered evidence (§ 1181, subd. (8)) is "looked upon with disfavor." (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.) It should be granted only if the defendant shows that: (1) the evidence is newly discovered; (2) the evidence is not cumulative; (3) there is the probability of a different result on retrial; (4) the defendant could not, with reasonable diligence, have discovered the evidence and produced it at trial; and (5) the evidence is the best evidence of the facts sought to be shown. (*People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*).) Only the third factor is at issue here. As to it, a "'probability'" means "'"merely a *reasonable chance*, more than an *abstract probability*."' [Citations.]" (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519, original italics.) A defendant establishes the probability of a different result on retrial if they show it is "probable that at least one juror would have voted to find [them] not guilty had the new evidence been presented." (*Id.* at p. 521.)

We review the denial of a new trial motion for abuse of discretion. (*Delgado*, *supra*, 5 Cal.4th at p. 328.) "'"We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." [Citation.]' [Citation.]" (*People v. O'Malley* (2016) 62 Cal.4th 944, 1016.) We will uphold the court's ruling "'"unless a manifest and unmistakable abuse of discretion clearly appears."' [Citations.]" (*Delgado*, at p. 328.)

There was no abuse of discretion here. The newly discovered evidence consisted of two bullets of a different caliber than those Gonzalez fired. They were found in the trunk of A.A.'s car, a place not associated with Gonzalez's crimes. And they were unspent, in contrast to the casings found in the passenger compartment of A.A.'s car and the alley behind Gonzalez's house. The bullets were not material to Gonzalez's guilt. (*People v. Watson* (1939) 35 Cal.App.2d 587, 591 [newly discovered evidence must be material].) There is thus no reasonable chance that Gonzalez would obtain a different result were evidence of the bullets admitted at retrial.

At most, evidence of the bullets might have helped to undermine A.A.'s testimony that she was not familiar with firearms. But A.A. explained that Gonzalez often placed items in the trunk of her car, and the jury found her credible on issues about which she testified. Moreover, newly discovered evidence that merely impeaches a witness's testimony is not grounds for granting a new trial motion. (*People v. Hall* (2010) 187 Cal.App.4th 282, 299.) Denial of Gonzalez's motion was proper.

This case is unlike *People v. Carter* (2014) 227 Cal.App.4th 322 (*Carter*) and *People v. Martinez* (1984) 36 Cal.3d 816 (*Martinez*), on which Gonzalez relies. *Carter* involved a new trial motion based on the insufficiency of the evidence presented at trial (§ 1181, subd. (6)). The standards for granting or denying such a motion are different than those for deciding a new trial motion based on newly discovered evidence. (Compare *Carter*, at pp. 327-328 with *Delgado*, *supra*, 5 Cal.4th at p. 328.) Most significantly, a new trial motion based on the insufficiency of the evidence requires the trial court to evaluate the evidence independently of the jury. (*Carter*, at pp. 327-328.) A new trial

motion based on newly discovered evidence has no similar requirement.

Unlike *Carter*, *Martinez*, *supra*, 36 Cal.3d at page 821, did involve a new trial motion based on newly discovered evidence. But the case is distinguishable. A jury convicted the *Martinez* defendant of commercial burglary because police found his palm print on a drill press that was purportedly painted just hours before the burglary. (*Id.* at p. 820.) The defendant acknowledged he had been at the burglary site several times and had touched the drill press, but could not explain how his palm print ended up on it after it was painted. (*Ibid.*) After the jury convicted him, the defendant discovered that the drill press had actually been painted as much as two weeks before the burglary, and moved for a new trial. (*Id.* at pp. 820-821.) The trial court denied the motion because "'the jury could very well have found, and probably would have found, that the print was put on there [the night of the burglary], even without'" the newly discovered evidence. (*Id.* at p. 821.)

Our Supreme Court disagreed. (*Martinez*, *supra*, 36 Cal.3d at p. 823.) Because the newly discovered evidence contradicted the strongest evidence against the defendant, the motion should have been granted. (*Ibid.*) "If the jurors even found a reasonable possibility that [the newly discovered evidence] was true, it is unlikely that they would [have found the] defendant's guilt proved beyond a reasonable doubt." (*Ibid.*)

Here, the prosecution's strongest evidence against Gonzalez was A.A.'s testimony and the bullet casings found in her car and in the alley behind Gonzalez's house. The bullets found in the trunk of A.A.'s car contradicted none of this

evidence. The trial court's denial of Gonzalez's new trial motion was not an abuse of discretion.[3]

Unconstitutional sentence

Gonzalez contends his 27-year prison sentence violates the federal and state constitutional prohibitions against cruel and/or unusual punishment. We disagree because the sentence was not grossly disproportionate to Gonzalez's crimes or culpability.

A sentence violates the state and federal constitutions if it is grossly disproportionate to the defendant's crimes or culpability. (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82-83 (*Palafox*); see *Rummel v. Estelle* (1980) 445 U.S. 263, 271; *People v. Dillon* (1983) 34 Cal.3d 441, 478-479 (*Dillon*).) To determine whether a sentence is grossly disproportionate, we examine the nature of both the offense and the offender, "with particular regard to the degree of danger both present to society." (*In re Lynch* (1972) 8 Cal.3d 410, 425.) We review the offense both in the abstract and in light of the totality of the circumstances, examining "such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of [the] acts." (*Dillon*, at p. 479.) As to the offender, we consider "such factors as . . . age, prior criminality, personal characteristics, and state of mind." (*Ibid*.)

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[3] While we do not condone the prosecution's eight-month delay in disclosing to Gonzalez evidence of the bullets found in A.A.'s trunk, for the reasons set forth above, the evidence was not material. (*United States v. Bagley* (1985) 473 U.S. 667, 681-682.) The prosecution's failure to produce it earlier did not prejudice Gonzalez. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

Our review is de novo. (*Palafox*, *supra*, 231 Cal.App.4th at pp. 82-83.) Because we accord the Legislature the "'"the broadest discretion possible in . . . specifying punishment for crime"'" (*Dillon*, *supra*, 34 Cal.3d at p. 478), determining that a sentence is disproportionate occurs with "exquisite rarity" (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196). Gonzalez must "overcome a 'considerable burden' [to] convinc[e] us his sentence was disproportionate to his level of culpability." (*Id.* at p. 1197.)

Gonzalez has not carried his burden. In the abstract, Gonzalez's crimes were serious. (See § 1192.7, subds. (c)(31) [assault with a firearm], (c)(36) [shooting from a vehicle] & (c)(38) [criminal threats].) They presented a significant risk of injury or death (*People v. Maldonado* (2005) 134 Cal.App.4th 627, 635 [assault with a firearm]; *People v. Overman* (2005) 126 Cal.App.4th 1344, 1362 [discharging a firearm]) or involved the infliction of severe mental trauma (§ 422, subd. (a)). And the circumstances under which they were carried out presented a substantial danger to society: Gonzalez apparently committed his crimes in reaction to A.A.'s refusal to take him to a bar, a particularly weak motive. He committed them against a vulnerable victim, the defenseless driver of a car. Gonzalez acted alone, unprompted by others. And his crimes carried potentially harsh consequences, especially to innocent bystanders in the alley or the building at which he shot.

Moreover, though just in his early 20's, Gonzalez already has a lengthy criminal history. As a juvenile, he was declared a ward of the court multiple times, often following true findings on assault allegations. As an adult, he suffered assault and criminal threats convictions after striking his then-girlfriend

with a baseball bat and threatening to kill her—crimes similar to those he committed against A.A. Nine years of his 27-year sentence were because of these prior convictions. (See *People v. Sullivan* (2007) 151 Cal.App.4th 524, 570 [no constitutional violation for punishing recidivists more severely].) Another 10 were because he used a firearm to commit his crimes. (See *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1231 [no constitutional violation for punishing those who use firearms more severely].) Based on the nature of Gonzalez's crimes and his individual culpability, and in light of our broad deference to the Legislature, we conclude that this is not one of the exquisitely rare cases in which a sentence is unconstitutional. (Cf. *People v. Haller* (2009) 174 Cal.App.4th 1080, 1088-1092 [upholding a sentence of 78 years to life in prison for convictions of assault with a deadly weapon, criminal threats, and stalking].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jeffrey G. Bennett, Judge

Superior Court County of Ventura

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